**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**
**CRIMINAL REVISION APPLICATION NO.130 OF 2005**

M/s. Indraprastha Holdings Ltd. ...Applicant
Vs.
Shri Vijay J. Shah & Anr. ...Respondents

Shri. Sanjay Rairkar i/by Shri.A.H.H.Ponda for the Applicant.
Shri. S.N.Chimade for the Respondent No.1.
Ms M.H. Mhatre, A.P.P. for the Respondent No.2.

**CORAM : A. S. OKA, J.**
**DATE : SEPTEMBER 21, 2005.**

**JUDGMENT:**

1. On the 25th July, 2005 this Revision Application was taken up for final hearing and after conclusion of hearing, today it is kept for dictation of judgment.

2. The question which arises for consideration in this Revision Application is whether the provisions of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act of 1881) as amended by the Negotiable Instruments (Amendment And Miscellaneous Provisions) Act, 2002, (hereinafter referred to as the Amending Act) are applicable to the complaints under section 138 of the said Act of 1881 which were pending on the date on which the Amending Act came into force.

3. With a view to appreciate the submissions made by the Counsel appearing for the parties, it will be

necessary to refer to facts of the case. The Applicant is the complainant in a complaint under section 138 of the said Act of 1881. The Respondent No.1 is the accused in the complaint. The complaint was filed in October, 2001 in the Court of the learned Additional Chief Metropolitan Magistrate, 3rd Court at Mumbai. Process was issued on the complaint. In the said complaint, the Applicant filed an affidavit of evidence on 06th May, 2004. Thereafter, an Application was made by the Respondent No.1 under section 145(2) of the said Act of 1881. The said Application came to be rejected by order dated 26th October, 2004. A Revision Application was preferred by the Respondent No.1 for challenging the said order. By Judgment and Order dated 12th April, 2005, the Revision Application was allowed by the learned Additional Sessions Judge. The learned Additional Sessions Judge held that as the Amending Act was brought into force on 06th February, 2003 i.e. after the date on which the complaint was filed, the Amended Act will apply prospectively unless otherwise made enforceable retrospectively. Therefore, the learned Additional Sessions Judge directed the learned Trial Judge to follow the procedure which was prevailing on the date of filing of the complaint.

4. The learned Counsel appearing for the Applicant has placed reliance on various decisions of the Apex Court. The learned Counsel for the Applicant submitted that the amendment made to the said Act of 1881 by the Amending Act will apply to all the pending complaints which were pending on the date on which the Amended Act was brought into force. He submitted that the amendment which was brought into force by the Amending Act was procedural in nature and hence will apply retrospectively. The learned Counsel appearing for the Respondent No.1 has supported the impugned order. He submitted that the Amending Act which deals with Penal provisions will obviously apply prospectively unless the Amending Act itself provides for retrospective operation.

5. I have considered the submissions. By Amending Act, Sections 143 to 147 were brought on the statute. Section 143 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under the Chapter XVII shall be tried by the Judicial Magistrate of First Class or by Metropolitan Magistrate and the provisions of Section 262 to 265 of the said Code shall, as far as may be, apply to such trials. Section 144 deals with mode of service of summons. Section 145 permits evidence to

be led by affidavits. Section 146 provides that on production of bank's slip having thereon official mark denoting that cheque has been dishonoured, the court shall presume the fact of dishonour of the cheque until such fact is disproved. Section 147 makes the offence punishable under the said Act of 1881 compoundable. It will be necessary to refer to the statement of objects and reasons of the Amending Act. In clause 1 of the statement of objects and reasons it is stated thus:

> The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. **The existing provisions in the Negotiable Instruments Act, 1881, namely, sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour inadequate, the procedure**

> **prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.**(Emphasis supplied)

Clause 2 takes a note of the fact that large number of cases are reported to be pending under sections 138 to 142 of the said Act of 1881 in various courts in the country. Clause 5 reads thus:

> **5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques,** enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act, 1881.(Emphasis supplied)

The object of the Amending Act seems to be to ensure that cases under section 138 are disposed of

expeditiously in a time bound manner. The another object seems to be to make the procedure less cumbersome. In the present case, we are concerned with section 145 which was brought on the statute book by virtue of the Amending Act. Section 145 reads thus:

> 145. Evidence on affidavit.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
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> . (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

Section 145 is a rule of procedure which lays down the manner in which the evidence of the complainant may be recorded. It provides that the evidence of the complainant may be given by him on affidavit and on

application made by the accused, the court shall summon and examine the person giving evidence on affidavit as to the facts contained therein. Thus section 145 is purely a rule of procedure. It is obvious that the rule of procedure which is incorporated in section 145 does not affect any vested right of either parties to the complainant.

6. The Apex Court in another decision reported in (2000)8 Supreme Court Cases Page 99 (Rajendra Kumar Vs. Kalyan) held thus:

> . **The law thus seems to be well settled that no person has, in fact, a vested right in procedural aspect- one has only a right of prosecution or defence in the manner as prescribed by the law for the time being and in the event of any change of procedure by an Act of Parliament one cannot possibly have any right to proceed with the pending proceeding excepting as altered by the new legislation and as such we need not dilate on the issue any further.**(Emphasis supplied)

7. The Apex Court in another decision reported in AIR 1958 Supreme Court Page 915 (Anant Gopal Sheorey Vs. The State of Bombay) dealt with the question whether a person has a vested right in any course of procedure. The matter before the Apex Court arose out of a complaint under section 282 of the Indian Companies Act and sections 465 and 477-A of the Indian Penal Code. The proceedings of the case commenced in the year 1954. On 12th August, 1955, the Criminal Procedure Code (Amendment) Act, 1955 was brought into force. On the basis of the said Amending Act, an Application was made by the accused before the learned Magistrate claiming a right to appear as a witness on his own behalf under section 342(A). Section 342(A) was brought on the statute book by virtue of the said Amending Act. The said application was dismissed and therefore, Revision Application was filed in the High Court of Nagpur. The High Court was of the opinion that the proceeding pending before the learned Magistrate would be according to the procedure laid down in the unammended Code. In paragraph No.4 of the said decision the Apex Court held thus:

> (4) **The question that arises for decision is whether to a pending prosecution the provisions of the amended**

> **Code have become applicable.** There is no controversy on the general principles applicable to the case. **No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode.** See Maxwell on Interpretation of Statutes on p.225; Colonial Sugar Refining Co.Ltd. V. V. Irving, 1905 AC 369(A). **In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.**(Emphasis supplied)

Another decision of the Apex Court will be relevant which is reported in AIR 1990 Supreme Court Page 209 (Gurbachan Singh V. Satpal Singh & Ors.). One of the questions before the Apex Court in the said decision was whether section 113(A) of the Indian Evidence Act, 1872 which was brought on statute book by Act 46 of

1983 can apply to a prosecution for an offence under section 306 of the Indian Penal Code which was committed prior to the date on which the said section was brought on the statute book. The Apex Court held that **"the provisions of the said section do not create any new offence and as such it does not create any substantital right but it is merely a matter of procedure of evidence and as such retrospective and will be applicable to this case".** The Apex Court quoted with approval Halsbury's Law of England which reads thus:

> . "The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature...."
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> 37. It has also been stated in the said volume of Halsbury's Law of England at page 574 that:

> **"The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.**(Emphasis supplied)

In the case of Hitendra Vishnu Thakur & Ors. Vs. The State of Maharashtra & Ors., reported in 1994 Supreme Court Cases (Cri.) Page 1087, the Apex Court had occasion to deal with the question of retrospective operation of amending Act. In paragraph No.26 of the said decision, the Apex Court held thus:

> 26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the Court. From the law settled by this

Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, **whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application,** should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is

substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statue should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished

(v) A statue which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

It cannot be disputed that section 145 is a purely procedural provision and the same does not affect any substantive rights of the parties. The said provision does not create any new offence or any new liability.

There is nothing in the Amending Act to indicate that the provisions therein were intended to apply only prospectively. Thus, the Section 145 will apply to all complaints pending on the date on which the Amending Act came into force. Such a construction is not textually impossible. A Division Bench of this Court in Criminal Writ Petition No.1222 of 2004 (KSL Industries Ltd. V. Khandelwal and Ors.) had occasion to deal with the provisions of the said Act of 1881 and in particular Chapter XVII thereof. The Division Bench also considered the effect of Section 145 of the said Act of 1881. The Division Bench gave various directions regarding expeditious disposal of the complaints under section 138. In Criminal Writ Petition No.1274 of 2005 (M/s. Indo International Ltd. & Anr. Vs.The State of Maharashtra & Anr.) this Court summarised the law laid down by the Division Bench in the decision of the KSL Industries which reads thus:

> "Thus, the law laid down by the Division Bench in the decision of KSL Industries can be summarised as under:
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> (a) The Court dealing with a complaint under section 138 of the said Act of 1881 has an

option to take evidence of the witnesses on the side of the prosecution as well as evidence of the accused and the defence witnesses, if any, on affidavit.

(b) If the evidence of a witness is taken on affidavit, after an application is made by the other party under sub-section (2) of section 145, it is not necessary to again record examination-in-chief of the witness whose affidavit of examination-in-chief is already filed.

(c) If an affidavit is filed under sub-section (1) of section 145 and an Application is made under sub-section (2) of section 145 by the other party, the witnesses must be made available for cross-examination by the rival party.

> In my view, the decision of the Division Bench clearly and unambiguously lays down the aforesaid propositions of law and the Division Bench has clearly answered the issue which was referred to it by the learned Single Judge of this Court.

Closer scrutiny of section 145 shows that the same is intended to ensure that the trial is concluded as expeditiously as possible. The said provision does not in any manner affect the right of the accused to cross-examine the complainant and his witnesses. The said provision enables even the defence evidence to be led by affidavits. Thus, the said provision is purely procedural in nature. In this behalf, decision of the Apex Court reported in AIR 1998 Supreme Court Page 1827(Shreenath and Another Vs. Rajesh & Ors.) is relevant. What has been held by the Apex Court is that in interpreting any procedural law, where more than one interpretations is possible, the one which curtails the procedure without eluding the justice is to be adopted. The procedural law is always subservient to and is in aid to justice.

8. The most of the provisions which are inserted by the Amending Act of 2002 and in particular section

145 are purely procedural in nature. The legislative intent as reflected from the statement of objects and reasons of Amending Act is to ensure that the procedure in complaints under section 138 should not be cumbersome and there should be expeditious conclusion of trials. Section 145 which merely affects the procedure will have to be presumed to be retrospective in its operation and will apply to all complaints pending on 06th February, 2003. Hence, the order passed by the Sessions Court deserves to be quashed and set aside. The learned Magistrate will now proceed to decide the complaint by applying section 145 of the said Act of 1881.

9. Hence, I pass the following order:

: O R D E R :

i) The impugned Order dated 12th April, 2005 passed by the learned Additional Sessions Judge quashed and set aside.

ii) The learned Trial Judge will proceed with the complaint in accordance with law.

iii) It is clarified that the provision of Section 145 of the said Act of 1881 will apply to the complaints which were pending on 06th February, 2003.

iv) Parties and the concerned Court to act upon an authenticated copy of this order.

**JUDGE**